

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NO. 1:11-md-02242-RWZ

IN RE: PROGRAF ANTITRUST LITIGATION

ORDER

December 17, 2013

ZOBEL, D.J.

Before the court is another installment in the parties' ongoing feud over the application of the attorney-client privilege. On May 3, 2013, I issued an order (Docket # 218) directing defendant Astellas Pharma US, Inc. ("Astellas") to apply a delineated set of rules in assessing whether certain documents are protected by the privilege or work-product doctrine. The order also instituted a "safe harbor" such that "if Astellas produces material which it later determines, in good faith, should have been withheld or redacted, it will enjoy the benefit of retracting that decision wrongly made without waiving the privilege." 5/3/2013 Order at 2-3.

After review, Astellas produced several thousands of documents to plaintiffs. Among them were three substantially identical sets of documents containing presentations that Astellas's counsel made to its employees regarding federal legislation and FDA enforcement actions. Astellas, asserting that these documents are privileged and were inadvertently produced, sought to "clawback" the materials under the safe harbor provision. Plaintiffs refused to accommodate the retraction and filed a motion to compel production of the documents, claiming that Astellas's disclosure was

intentional or reckless, its clawback request was tardy, and that the privilege had been waived through disclosure to a third party.

I find that the current circumstances fall squarely within the safe harbor provision outlined in my prior order. Astellas did not waive the privilege with respect to these documents and the disclosure appears to have been a good faith error. Plaintiffs' motion to compel (Docket # 296) is DENIED.

December 17, 2013

DATE

/s/Rya W. Zobel

RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE

